Supreme Court, U.S.
FILED

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No._____

IN THE

Supreme Court of the United States

October Term 2000

L.T. BRANT,
Petitioner,
v.
EARLE LILLY, PIRE & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLAGE of MEDICINE, EARNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDE LOHNER, ANN M. HODGES AND JOEL A. NASS,
Respondent.

On Petition For Writ of Certiorari To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Does the award of $100,000 in punitive fines against a plaintiff's lawyer, as a sanction for filing frivolous pleadings, have a chilling effect on the First Amendment right of the people to petition the Government for the redress of grievances and the Fifth Amendment right to retain counsel in a civil case?

(2) Does the Due Process / Equal Protection clause of the Fourteenth Amendment prohibit imposing a punitive fine against a lawyer under Rule 13, Tex. R. Civ. P., that is 200 times greater than the maximum amount promulgated by the Texas Legislature?

(3) Does the imposition of a punitive fine that is 200 times greater than the maximum amount promulgated by the Texas Legislature violate the Eighth Amendment proscription against excessive fines?

(4) Does a judgment ordering Petitioner to pay a punitive fine to individuals, instead of the state, violate the Due Process clause of the Fourteenth Amendment? *Bajakajian* infra.

(5) Is a judgment imposing a punitive fine upon Petitioner unconstitutionally vague in violation of the Due Process clause of the Fourteenth Amendment when it is impossible to ascertain from the four corners of the judgment who are the judgment creditors and how the fine should be apportioned among them?

(6) Does the state court's violation of the federal "snapshot rule" in imposing sanctions against a lawyer violate the Due Process clause of the Fourteenth Amendment?

(7) Does the Due Process clause of the Fourteenth Amendment prohibit the imposition of punitive fines against a lawyer under Rule 13, Tex. R. Civ. P. for conduct of co-counsel or for conduct that the sanctioned lawyer did not engage in?

(8) Does the failure of the Supreme Court of Texas to correct a line of state cases (including this case) and to bring same into compliance with this Honorable Court's decisions in *Gompers* and *Bagwell*, violate Petitioner's Due Process rights under the Fourteenth Amendment?

(9) Was Petitioner impermissibly denied basic procedural due process protections under the Fifth, Sixth and Fourteenth Amendment, including the right to trial by jury and proof beyond a reasonable doubt, before punitive fines of $100,000 were imposed against him?

(10) Was Petitioner subjected to multiple and/or successive punishments for the same conduct in violation of his Double Jeopardy protections under the Fifth and Fourteenth Amendments when Petitioner was: (i) fined $500 for criminal contempt, (ii) then acquitted in a separate criminal contempt proceeding, and (iii) then fined $100,000 for the same conduct?

PARTIES

Petitioner: L.T. Bradt

Respondents:

Earle Lilly
Piro & Lilly, P.C.
Depelchin Children's Center
Baylor College of Medicine
Ernest Kendrick
Jean Guez
Barbara Taylor
Luisa Maria Acevedo Lohner
Ann M. Hodges
Michael D. Cox [1]
Judy Sebek [2]

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[1] Michael D. Cox died during the pendency of this appeal in State court. His estate has not formally substituted in as a party to this appeal.

[2] Judy Metzger Sebek settled with Petitioner while this case was pending in the First Court of Appeals and she is, therefore, no longer a party to this appeal. She is identified for the sake of completeness.

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To the Honorable Chief Justice of the United States Supreme Court and to the Associate Justices of the United States Supreme Court:

L.T. Bradt ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Texas, which declined to review the decision of the First Court of Appeals of Texas which affirmed the trial court's judgment imposing a $100,000 punitive fine under Rule 13, Tex. R. Civ. P. against Petitioner.

REPORTS OF OPINIONS

The judgment of the 234th Judicial District Court of Harris County, Texas dated April 8, 1996, awarding the punitive fines is set forth in Appendix A.

The Opinion of the First Court of Appeals of Texas dated January 13, 2000, affirming the trial court's award of punitive fines, is reported at 14 S.W.3d 756, and is set forth in Appendix B.

The Order of the First Court of Appeals of Texas dated April 7, 2000, denying Petitioner's motion for rehearing, is set forth in Appendix C.

The Order of the Supreme Court of Texas, denying the Petition for Review dated August 10, 2000, is not reported and is set forth in Appendix D.

The Order of the Supreme Court of Texas, denying rehearing of the Petition for Review dated September 28, 2000 is set forth in Appendix E.

The Show Cause Order, requiring Petitioner to present and show cause why he should not be held in contempt dated August 18, 1992, is set forth in Appendix F.

The Order acquitting Petitioner of contempt dated December 4, 1992, is set forth in Appendix G.

The Texas Attorney General's Medicaid Fraud Control Unit's Investigative Report for Prosecution Analysis is contained in Appendix I.

JURISDICTION

The Supreme Court of Texas denied Petitioner's Motion for Rehearing of the Denial of the Petition for Review on September 28, 2000. That Order is set forth in Appendix E. The Supreme Court of Texas denied Petitioner's Petition for Review on August 10, 2000. That Order is set forth in Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATUTES INVOLVED

The following statutes are involved in this case: Rule 13 and Rule 215, Texas Rules of Civil Procedure; Sections 21.001 and 21.002, Texas Government Code; Section 9.001, et seq. and Section 10.001, et seq., Texas Civil Practice and Remedies Code. These are set forth in Appendix H.

The following Constitutional provisions are involved in this case: First, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. These are set forth in Appendix H.

REASONS TO GRANT THIS PETITION

If allowed to stand, this published opinion will have a *chilling* effect on the First Amendment rights of the citizens of Texas who champion unpopular causes to retain legal counsel and thereby to petition the Government for the redress of grievances. The Supreme Court of Texas, in denying the Petition for Review, affirmed the decision of the First Court of Appeals, which decided important questions of federal law in ways that conflict with the decisions of this Honorable Court and which decided an important question of federal law that has not been, but should be settled by this Honorable Court. As set forth herein, the decision of the First Court of Appeals directly

conflicts with the following decisions of this Honorable Court, among others: *United States v. Bajakajian*, 524 U.S. 321 (1998); *Hudson v. United States*, 522 U.S. 93 (1997); *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Bankers Trust Co. v. Blodgett*, 260 U.S. 647 (1923) and *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911).

This case involves the important unanswered questions of constitutional law of whether the assessment of $100,000 in punitive fines against Petitioner, and filing a frivolous pleading violates the First Amendment right of the people to petition the Government for a redress of grievances, and the Eighth Amendment proscription against excessive fines, and further, whether the award of punitive fines violates the jurisdictional limit of the Texas Rules of Civil Procedure.

This case presents the proposition of law that a party and his attorney may be subjected to serious punitive fines by the state courts of Texas, without fundamental constitutional due process protections. The trial court and the Court of Appeals applied the wrong burden of proof, impermissibly denied Petitioner the right to a jury trial and denied Petitioner *due process* in order to impose punitive fines. Although not couched explicitly in such terms, the opinion of the First Court of Appeals is also an unconstitutional *ex post facto* application of § 10.004 of Tex. Civ. Prac. & Rem. Code in violation of the Due Process Clause of the Fourteenth Amendment.[1]

If the concept of the law as applied by the Texas courts in this case had been in place in the '60's, we would never have experienced the civil rights movement or the privileges that we

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[1] As shown in Appendix H, Section 10.001, et seq. *Tex. Civ. Prac. & Rem. Code* was enacted in 1995 and was made effective only to causes of action filed on or after September 1, 1995.

enjoy from it today. If this concept of the law had been in place in the '50's, a lawsuit challenging *Plessy v. Ferguson*, 163 U.S. 537 (1896), would have been groundless and filed in bad faith, instead of being the product of the legal genius of Thurgood Marshall as reflected in *Brown v. Board of Education*, 349 U.S. 294 (1955).

These constitutional errors raise issues of fundamental importance to the jurisprudence of Texas and this Country, and merit correction by this Honorable Court.

STATEMENT OF THE CASE

In 1990, Mark Metzger, acting through his previous attorney, James Drexler, filed suit in the 269TH District Court of Harris County, Texas, against Respondents herein. In 1991, Petitioner substituted in as Metzger's attorney and filed several amended pleadings on behalf of Metzger. The pleadings were substantially similar to those filed by attorney Drexler but did include additional causes of action. Further, some of the material allegations raised by the pleadings filed in this case by Petitioner are virtually identical to the allegations of criminal conduct found by the Texas Attorney General's Medicaid Fraud Control Unit's Investigative report contained in Appendix I and involved many of the Respondents herein.

Metzger's trial to a jury occurred in 1992 and a directed verdict was granted in favor of the Respondents in May, 1992. During trial, Petitioner was twice held in contempt by the trial court. See *Metzger v. Sebek*, 892 S.W.2d 20 (Tex. App. -- Houston [1st Dist.] 1994, writ denied, cert. denied). Petitioner paid the $500 fine on one of the contempts and was subsequently acquitted on the other contempt. See Appendix G and *Bradt v. West*, 892 S.W.2d 56, 64 (Tex. App. – Houston [1st Dist.] 1994, writ denied).

Following trial, Respondents filed motions for sanctions under Rule 13, Tex. R. Civ. P., claiming that Metzger and his counsel had filed frivolous pleadings. Thereafter, sanctions in

the amount of $994,000 were awarded against Metzger, Petitioner, and one of Petitioner's co-counsel - Joe Alfred Izen, Jr. Immediately after the trial ended in 1992, the trial court issued the Show Cause Order (Appendix F) commanding Petitioner to appear and show cause why he should not be held in criminal contempt for his conduct during the trial. This contempt was sought by the Respondents. After a full trial on the merits of the second contempt, Petitioner was acquitted. Appendix G.

In the first appeal the $994,000 sanction was reversed and rendered as against Petitioner's co-counsel, Joe Alfred Izen, Jr.; reversed and remanded as to Petitioner; and remanded only for determination of the amount of sanctions as to Metzger. See *Metzger v. Sebek*, 892 S.W.2d 20 (Tex. App. – Houston [1ST Dist.] 1994, writ denied, cert. denied).

Petitioner's amended pleadings alleged what he believed was mental health care fraud that was effectuated through false allegations of abuse by Respondents. Such pleadings also alleged fraud against the Respondent mental health care professionals in billing Metzger and his insurance company - fraud which was similar to and clearly documented by the Attorney General's Medicare Fraud Control Unit Report. (See Appendix I) The allegations of fraud were similar in time, conduct and parties as those documented in the Medicare Fraud Control Unit Report.

Following reversal and remand, in April, 1996, the trial court conducted a second hearing on Respondents' Motions for Sanctions under Rule 13, Tex. R. Civ. P.. Although Metzger had previously paid a jury fee and demanded a trial by jury before the first trial, both Metzger and Petitioner were denied a jury trial in the determination of sanctions. At trial of the sanctions motions, Petitioner and Metzger were each assessed $100,000 in punitive fines ($200,000 total) for violating Rule 13, Tex. R. Civ. P.. (Appendix A). Metzger discharged the sanctions against him in bankruptcy and did not appeal.

The punitive fines that were imposed under Rule 13, Tex. R. Civ. P., were ostensibly compensation for the Respondents. (Appendix A and B). Petitioner appealed to the First Court of Appeals, which affirmed the trial court, and then to the Supreme Court of Texas, which denied, without written opinion, the Petition for Review. All United States constitutional issues raised in this Application were raised in Petitioner's pleadings before the First Court of Appeals and before the Supreme Court of Texas.

ARGUMENT AND AUTHORITY

QUESTION ONE: Does the award of $100,000 in punitive fines against a plaintiff's lawyer, as a sanction for filing frivolous pleadings, have a chilling effect on the First Amendment right of the people to petition the Government for the redress of grievances and the Fifth Amendment right to retain counsel in a civil case?

The First Amendment of the United States Constitution protects litigants and guarantees citizens the right to access the courts and to petition the Government for a redress of grievances through the courts. *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1974). The First Amendment is made binding upon the states by the Fourteenth Amendment. Further, the Fifth Amendment has been construed by the Fifth Circuit to include the right to retain counsel in a civil case. *Potashnick v. Port City Construction, Inc.*, 609 F.2d 1101, 1118 (5th Cir. 1980). These fundamental constitutional protections are emasculated by the threat of unlimited punitive fines imposed against lawyers who champion unpopular causes or attack the politically influential establishment. The effect of the upholding of these "professional death penalty" sanctions in a published opinion has had a chilling effect upon the rights of litigants in Texas, and their ability to retain legal counsel in civil

cases due to the clear and ominous threat by the state courts of Texas that unlimited punitive fines may be imposed upon unpopular litigants and their counsel, without guiding principles or proper Due Process considerations.

QUESTION 2: Does the Due Process / Equal Protection clause of the Fourteenth Amendment prohibit imposing a punitive fine against a lawyer under Rule 13, Tex. R. Civ. P., that is 200 times greater than the maximum amount promulgated by the Texas Legislature?

QUESTION 3: Does the imposition of a punitive fine that is 200 times greater than the maximum amount promulgated by the Texas Legislature violate the Eighth Amendment proscription against excessive fines?

The Texas Legislature codified the courts' inherent power to punish for contempt in Section 21.002, (Texas Government Code) (Appendix H).The Texas legislature prescribed a maximum punishment of six months in jail and a $500 fine for an act of contempt in section 21.002(b), (Texas Government Code). In light of the specific language of Rule 13, requiring that violation of the rule be treated as a contempt, the proceedings against Petitioner must be in the nature of criminal contempt proceedings since he was tried (and punished) for past behavior, with no opportunity to purge.

The trial court and the Court of Appeals attempted to distinguish the cases cited by Petitioner, holding that the Rule 13 proceedings were not a contempt. The Court of Appeals, Appendix B, pages 31a - 34a, addressed Petitioner's contention that the proceedings were a contempt, with a different burden of proof and a limitation on the amount of fine that can be imposed. However, the Court of Appeals ruled that the

proceedings were not contempt proceedings. This holding violated the express requirements of Rule 13, Tex. R. Civ. P., which requires that:

> Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleadings which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, **shall be held guilty of a contempt.** If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, **shall impose an appropriate sanction available under Rule 215-2b**, upon the person who signed it, a represented party, or both. [Emphasis supplied.] (Appendix H)

Rule 215-2b, Tex. R. Civ. P., authorizes the imposition of sanctions. The Rule 215-2b, Tex. R. Civ. P., sanctions include compensatory attorneys fees in very defined circumstances - none of which are applicable here - as well as the power to punish for contempt. Other than through the court's inherent power to punish for contempt, neither Rule makes any provision for the imposition of punitive fines against an offending party.

A contempt fine is civil and remedial if it "either coerce[s] the defendant into compliance with the court's order, [or] ... compensate[s] the complainant for losses sustained." Where the fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. Thus, a "flat, unconditional fine" totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance. *Bagwell*, 512 U.S. at 829 (quoting *United States v. Mine Workers*, 330 U.S. 258, 303-04 (1947), and *Penfield Co. of Cal. v. SEC*, 330 U.S,. 585, 590 (1947)) [2]

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[2] This fine cannot constitute compensation to the Respondents because at least 3 of the Respondents presented no evidence as to damages that they allegedly sustained as a result of Petitioner's conduct. See Question 4,

When the fine is analyzed under the seven factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 - 169 (1963), the fine unquestionably meets at least four of those factors to transform what may have been a civil proceeding into a criminal one. The fact that the fine was originally $994,000 makes this analysis even clearer.

Texas Rules Do Not Provide For Serious Punitive Fines

Although the First Court of Appeals characterized the proceedings against Petitioner as a "civil proceeding," (Appendix B, page 34a) in affirming the $100,000 sanction against Petitioner, the Court of Appeals classified the award as a "fine" ten different times (Appendix B). The Court of Appeals overruled Petitioner's point of error that the proceedings against him were at least "quasi-criminal" and agreed with the trial court to view the proceedings as civil. If this was not a contempt proceeding, then the imposition of punitive fines is not a permitted civil sanction under Rule 13 or Rule 215, Tex. R. Civ. P.. (Appendix B, page 34a; Appendix H) Such a construction of the Rules is an erroneous judicial construction of a rule of procedure that violates Petitioner's Due Process rights.

Petitioner was punished for past conduct, with no opportunity to purge; therefore, the sanction cannot be categorized as a civil coercive fine. Punitive fines are permitted in the context of Rule 13 proceedings, but only as part of contempt proceedings. Assuming, *arguendo*, that punitive fines are permitted under Rule 13, then those fines are limited by § 21.002, Texas Government Code, to a maximum of $500. Punitive fines greater than permissible under the contempt statute are not a prescribed remedy under Rule 13 or Rule 215, Tex. R. Civ. P.. (Appendix H) and, when those punitive fines are 200 times the maximum permissible fine for contempt, they must as a matter of law constitute excessive fines because they are "grossly disproportionate" to the maximum fine permitted. *United States v. Bajakajian*, 524 U.S. 321 (1998); *Hudson v. United States*, 522 U.S. 93 (1997).

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below, for cites to Record.

When he filed the pleadings in 1991 and 1992, Petitioner had no way of knowing that Rule 13 could be construed in a manner to allow the imposition of virtually unlimited punitive fines. A person is only held to know what the law is on the day that he engages in the conduct which is sought to be punished. *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), cert. denied, 466 U.S. 980. Due process requires that a person be given fair notice as to what constitutes prohibited conduct so that he may conform his conduct to the requirements of the law. *Dahlstrom*; Fifth and Fourteenth Amendments, U.S. Constitution. Since Petitioner could not have known that his conduct would subject him to punitive fines, the assessment of such a fine violates Petitioner's Due Process rights.

Under this authority, which was cited to the Supreme Court of Texas and the First Court of Appeals, the Court of Appeals erred when it decided that the proceedings against Petitioner were not in the nature of criminal contempt proceedings.

QUESTION 4: Does a judgment ordering Petitioner to pay a punitive fine to individuals, instead of the state, violate the Due Process clause of the Fourteenth Amendment?

The Punitive Fine is Not Compensation

In *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994) this Honorable Supreme Court held that where a fine is not compensatory, it is civil only if the contemnor is afforded the opportunity to purge; and that a flat, unconditional fine of as little as $50 is criminal if the contemnor has no opportunity to purge.

While the Court of Appeals also denominated the $100,000 fine against Petitioner as "compensation," that reasoning fails because: (1) the sum bears no relation to the damages claimed by Respondents and (2) some of the Respondents, *e.g.*, Earl Lilly, Piro & Lilly, P.C. and Joel Nass, presented no evidence at the hearing on sanctions. (R.R. Sanctions hearing, pp. 12 - 13; 20, 23) Petitioner raised this lack of evidence before both the

First Court of Appeals and the Supreme Court of Texas. As they presented no evidence as to the damages that they allegedly suffered from the sanctioned conduct, those Respondents who presented no evidence cannot be compensated as a matter of law. To hold otherwise violates Petitioner's Due Process rights.

Compensatory "punitive fines" / Due Process Violation

In affirming the judgment, the First Court of Appeals categorized the proceedings as civil but denominated the sanctions as a "fine." Appendix B, page 34a. The First Court of Appeals also concluded that the $100,000 fine constituted "compensation." This categorization presents several due process considerations that merit review by this Honorable Court.

First, the Court of Appeals ignored the manner in which the trial court characterized the proceeding, which was:

> "As with any effort to determine the **intent** of an **accused**, because of the improbability of an **admission of guilt** the Court must look to circumstantial evidence. ... While some of the actions noted below are beyond the scope of **punishment** in this proceeding ..." (Appendix A, page 6a)[Emphasis supplied]

This evidences an intent by the trial court to consider scienter of the accused, i.e. the Petitioner, and thus this is clearly a criminal proceeding.

Second, as of 1992, when the *Metzger* case was tried, the State of Texas had partially abrogated the "American rule" and adopted "loser pay" for attorney's fees in personal injury litigation, but that was only in the context of § 9.001, et seq., Tex. Civ. Prac. & Rem. Code. (Appendix H) Rule 13, Tex. R. Civ. P., made no reference to compensation and could not be used for compensation. However, § 9.001, et seq., Tex. Civ. Prac. & Rem. Code, had a 90-day "safe-harbor" provision which Petitioner was never afforded. This statute could not, therefore, be used as a basis to sanction Petitioner.

On September 1, 1995, the Texas Legislature enacted Section 10.004, Tex. Civ. Prac. & Rem. Code (Appendix H) - applicable **only** to cases commenced on or after that date, and

thereby partially abrogated the "American rule." Since the offending conduct occurred no later than 1992, this constitutes an impermissible *ex post facto* application of this statute.

By considering the sanction to be compensation - a remedy not contemplated by Rule 13, the First Court of Appeals impermissibly applied either (i) the standard of § 9.012, Tex. Civ. Prac. & Rem. Code - without affording Petitioner the beneficent effect of the safe-harbor provision, or (ii) § 10.004, Tex. Civ. Prac. & Rem. Code - *ex post facto*. Either application would constitute a violation of Petitioner's due process rights under the United States Constitution.

The Due Process clause prohibits the judiciary from retroactively applying unforeseeable judicial construction of a criminal statute. *Bouie v. City of Columbia*, 378 U.S. 347, 352 - 53 (1964). A new judicial doctrine cannot be applied retroactively if it was an "unexpected and indefensible" break from existing case law, *Bouie*, 378 U.S. at 354, or if it marks a significant departure from prior case law, *i.e.*, it announces a judicial construction that imposes criminal liability for conduct not punishable under previous case law. *Marks v. United States*, 430 U.S. 188, 194 - 96 (1977).

QUESTION 5: Is a judgment imposing a punitive fine upon Petitioner unconstitutionally vague in violation of the Due Process clause of the Fourteenth Amendment when it is impossible to ascertain from the four corners of the judgment who are the judgment creditors and how the fine should be apportioned among them?

Due Process Violation - Judgment not Specific

The judgment in question (Appendix A) does not identify any defendant, except Sebek, who has settled with Petitioner. The law in Texas is that "[A] judgment must be sufficiently definite and certain to define and protect the rights of all litigants, or it should provide a definite means of ascertaining

such rights, to the end that ministerial officers can carry the judgment into execution without ascertainment of facts not therein stated." *Stewart v. USA Custom Paint & Body Shop, Inc.*, 870 S.W.2d 18, 20 (Tex. 1994). This judgment does not comply with this requirement. While this case was pending on appeal, Petitioner settled with Sebek; therefore the only defendant identified in the judgment has released any interest therein. Since there are no other "defendants" identified, the judgment lacks the specificity required by the Due Process Clause. However, the First Court of Appeals and the Supreme Court of Texas refused to correct this deficiency in the judgment, even though this error was addressed in Petitioner's Motion for Rehearing at the Court of Appeals and in Petitioner's Petition for Review to the Supreme Court of Texas. (page 46a, Appendix B) This Honorable Court has never addressed the specificity that is required in a judgment, when evaluated by the Due Process standard..

As set forth above, not all of Respondents presented evidence on their alleged damages during the hearing on sanctions. One of the trial court's specific findings for the imposition of sanctions was Petitioner's use of Metzger's perjurious affidavit, to defeat motions for summary judgment. (Appendix A, page 3a) [1] However, Petitioner addressed in his Fifth Point of Error to the First Court of Appeals and to the Supreme Court of Texas, that not all Respondents moved for summary judgment; therefore, even if the use of Metzger's perjurious affidavit could constitute grounds for sanctions, under Due Process considerations, the use of Metzger's affidavit would not support sanctions in favor of parties who had not moved for summary judgment In *GTE Communications Systems Corporation v. Tanner*, 856 S.W.2d 725 (Tex. 1993), the Supreme Court of Texas held that an attorney could not be sanctioned for using an affidavit that he did not sign.

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[1] The Order refers to the responses to the motions for summary judgment. The only substantive complaint advanced by Respondents as to those responses was that Metzger's affidavit was perjurious. Of necessity, therefore, Respondents' complaint against Petitioner was his use of Metzger's affidavit, which Petitioner did not sign.

QUESTION 6: Does the state court's violation of the federal "snapshot rule" in imposing sanctions against a lawyer violate the Due Process clause of the Fourteenth Amendment?

The law in Texas is that in deciding whether sanctions are warranted for pleadings allegedly filed in bad faith, the court must examine the law and facts available to the attorney at the time that the pleadings were filed. *See, e.g., Campos v. Ysleta General Hospital, Inc.*, 879 S.W.2d 67 (Tex. App. - El Paso 1994, writ denied). This is what is known in federal courts as the "snapshot rule." *See e.g., Federal Deposit Insurance Corporation v. Calhoun*, 34 F.3d 1291 (5th Cir. 1994). All Federal Circuits employ the snapshot rule in the context of Rule 11, Fed. R. Civ. P. sanctions. Rule 13, Tex. R. Civ. P. sanctions are the Texas equivalent of the federal Rule 11.

A person is only held to know what the law is on the day that he engages in the conduct which is sought to be punished. *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), cert. denied 466 U.S. 980. Due process requires that a person be given fair notice as to what constitutes prohibited conduct so that he may conform his conduct to the requirements of the law. *Dahlstrom*; Fifth and Fourteenth Amendments, U.S. Constitution. This is the essence of the "snapshot rule."

The trial court violated the requirement that the law be determined as of the day the offending pleadings were filed when it failed to apply cases that recognized causes of action at the time the pleadings were filed and by considering cases that were decided years after the pleadings were filed, to conclude that certain causes of action did not exist at the time the pleadings in question were filed. *See* Appendix A, Order, at pp. 4a - 5a. Every law which makes criminal an act which was innocent when done, or which inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution. *Calder v. Bull*, 3 Dall. (3U.S.) 386, 390 (1798); *Ex parte Garland*, 4 Wall (71 U.S.) 333, 377 (1867); *Burgess v. Salmon*, 97 U.S. 381,

384 (1878). The constitutional prohibition may not be evaded by giving a civil form to a measure which is essentially criminal. *Bankers Trust Co. v. Blodgett*, 260 U.S. 647, 652 (1923).

Petitioner raised the violation of the "snapshot rule" in the First Court of Appeals as part of Petitioner's Fifth Point of Error; and raised it again before the Supreme Court of Texas. Instead of focusing on the impermissible determination of causes of action that were not abrogated until years later, the First Court of Appeals focused instead on the elements of the causes of action that Petitioner did not prove and ignored the fact that Petitioner was sanctioned for bringing causes of action that supposedly either did not exist or which had been abrogated by the Supreme Court. *See* Appendix B, pages 38a - 44a.

The trial court based, and the First Court of Appeals affirmed, the sanctions against Petitioner on the grounds that the causes of action asserted did not exist in law when the pleadings were filed. When Petitioner pointed out cases that proved that the asserted causes of action did exist when the pleadings were filed, both courts then conducted an in-depth analysis of the elements of such causes of action that Petitioner did not prove as a basis to assess and uphold the sanctions.

To sanction Petitioner for filing causes of action that were not abrogated until years after Petitioner filed the pleadings alleging those causes of action and for which he was sanctioned, violates Petitioner's Due Process rights.

QUESTION 7: Does the Due Process clause of the Fourteenth Amendment prohibit the imposition of punitive fines against a lawyer under Rule 13, Tex. R. Civ. P. for conduct of co-counsel or for conduct that the sanctioned lawyer did not engage in?

QUESTION 8: Does the failure of the Supreme Court of Texas to correct a line of state cases (including this case) and to bring same into compliance with this Honorable Court's decisions in *Gompers* and Bagwell, violate Petitioner's Due Process rights under the Fourteenth Amendment?

Due Process Violation - One Punishment for Multiple Acts, Some Not Supporting Sanction

Only one punishment was assessed for all of Petitioner's alleged conduct. The trial court, in assessing this amount, considered many matters for which Petitioner cannot be sanctioned, or which Petitioner did not commit. These include Plaintiff's First Amended Petition, which was signed by James Drexler; Metzger's affidavit; matters for which Petitioner paid a fine; matters alleged to constitute contempt, for which Petitioner was tried and acquitted; the alleged conduct of Joe Alfred Izen, Jr.; Metzger's suit against Judge West and others in federal court; and, causes of action that were abolished by the SupremeCourt of Texas years after the case was tried in1992.[2]&[3] Appendix A,

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[2] At Appendix B, page 45a, the First Court of Appeals refers to a suit brought in federal court against the defendants, citing *Bradt v. West*, 892 S.W.2d at page 64. At Appendix A, page 6a, the trial court referred to sanctions that were allegedly imposed against Bradt in that federal suit. However, Petitioner had nothing to do with Metzger's suit in federal court and was neither a party nor an attorney to that suit and was not sanctioned in that suit. This is reflected in *Bradt v. West*, 892 S.W.2d at page 64, where the Court of Appeals correctly notes that Metzger returned to federal court and that it was Metzger who was ordered to pay the attorney's fees and costs.

[3] The trial court noted that Petitioner could not be sanctioned for the conduct constituting the contempt, but used that conduct in determining the amount of sanctions to impose. The trial court, at Appendix A, page 10a, found that Petitioner had violated the order in limine. That violation was the subject of the second contempt proceeding, Appendices F and G; and Petitioner was acquitted in that proceeding. (Appendix G) The trial court's erroneous finding was repeated by the First Court of Appeals.

pages 4a - 6a; Appendix B, page 45a. Petitioner raised in his sixth point of error in the Court of Appeals the issue that the judgment was void since one punishment was imposed for multiple acts of conduct, some of which would not support the judgment (*see, e.g., Ex parte Jordan*, 787 S.W.2d 367 (Tex. 1990)). The Court of Appeals held that "a trial court's Rule 13 Sanction Order must be upheld if any of the facts set forth by the court supports the sanctions," citing *Monroe v. Grider*, 884 S.W.2d 811 (Tex. App. - Dallas 1994, writ denied) and *New York Underwriters Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 856 S.W.2d 194 (Tex. App. - Dallas 1993, no writ). Appendix B, at page 38a. The Court of Appeals thereby ignored this Honorable Court's decision in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 440 - 41 (1911), wherein this Court held that where a person has punishment imposed for multiple acts, the judgment must be reversed if the defendant has been sentenced on any count which did not constitute a disobedience.

The First Court of Appeals did not find that **all** of the findings of the trial court would support Rule 13 sanctions, rather it only addressed those findings that it opined would properly support the sanctions. Appendix B, pages 38a - 44a. This is a tacit admission by the Court of Appeals that Petitioner is correct when he argued that some of the trial court's findings would not support sanctions under Rule 13. However, instead of reversing the judgment, as *Gompers* requires, the First Court of Appeals joined with the Dallas Court of Appeals to hold that attorneys may be subjected to a denial of due process and equal protection in sanctions proceedings, when, if the proceedings were contempt proceedings under Texas law, the defective judgment would have been reversed.

Further, the authority of *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 440 - 41 (1911) and *Ex parte Jordan*, 787 S.W.2d 367 (Tex. 1990) required the First Court of Appeals and the Supreme Court of Texas to reverse and render the judgment as *Gompers* requires.

QUESTION 9: Was Petitioner impermissibly denied basic procedural due process protections, under the Fifth, Sixth and Fourteenth Amendments, including the right to trial by jury and proof beyond a reasonable doubt, before punitive fines of $100,000 were imposed against him?

Wrong Burden of Proof - Due Process Violation

Beginning at page 31a of Appendix B, the Court of Appeals flatly rejected Petitioner's point of error that the wrong burden of proof was employed, holding that the proceeding was a civil proceeding. Regardless of how characterized by the trial court and the Court of Appeals, the proceedings against Petitioner were, according to this Court's precedent, clearly in the nature of criminal contempt proceedings since he was tried (and punished) for past behavior and Petitioner had no opportunity to purge the fine. *Bagwell* Further, Petitioner was subjected to a (constitutionally) serious penalty – one that was originally $994,000. *Metzger v. Sebek*, 892 S.W.2d 20 (Tex. App. – Houston [1sts Dist.] 1994, writ denied, cert. denied). The fact that the sanctions were reduced from $994,000 to $100,000 following remand, does not change the nature of the proceedings or lessen the scrutiny to be given to the procedure used to assess them.

Whether or not the proceedings were contempt proceedings, Petitioner was nevertheless facing a "serious penalty"; the proceedings against Bradt were therefore quasi-criminal and the burden of proof should have been "beyond a reasonable doubt." *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). Having been tried and held to the lower burden of proof, this Honorable Court should hold that Petitioner's Due Process rights were violated.

Right to Jury Trial

Petitioner was first sanctioned $994,000, which, following remand was reduced to $100,000 - a serious penalty under the United States Constitution. A jury fee was paid in the case but

the trial court denied Petitioner a jury trial. [4] In addressing Petitioner's second point of error, the First Court of Appeals affirmed that ruling, holding that even though Metzger had demanded a jury trial, Petitioner had not demanded a jury trial and was not a party to the proceedings. (Appendix B, page 34a).. This conflicts with the decisions of this Honorable Court in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994); and *Muniz v. Hoffman*, 422 U.S. 454 (1978), and adversely impacts Petitioner's Sixth Amendment Rights *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994); *see also Hicks v. Fejock*, 485 U.S. 624, 632 (1988) (in a contempt action, as in any other, "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings")

Burden of Proof

By his first point of error at the Court of Appeals, Petitioner raised the question of whether the wrong burden of proof was used against him. The First Court of Appeals held that Petitioner was not entitled to have the evidence used against him to meet the standard of proof beyond a reasonable doubt. Appendix B, pages 31a - 34a. Further, the First Court of Appeals did not even apply the lesser standard of "clear and convincing evidence" which is usually required in quasi-criminal proceedings in Texas. *See, e.g., Lawson-Avila Construction, Inc. v. Stoutamire*, 791 S.W.2d 584 (Tex. App. - San Antonio 1990, writ denied).

The Court of Appeals held that the proceedings against Petitioner were not a contempt, even though the Court of Appeals characterized the sanction as a "fine" ten different times. In *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418,

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[4] Interestingly, while the Court of Appeals found that Petitioner was not a party, Metzger, who was a party, was also denied a jury trial on his sanctions of $100,000. If Metzger was entitled to a jury, Petitioner was also.

444 (1911), this Honorable Court held that if a sentence is wholly punitive, "it could have been imposed only in a proceeding instituted and tried as a contempt" and that the defendant "must be proved guilty beyond a reasonable doubt." *Id.*

The judgment of the trial court and the decision of the Court of Appeals therefore conflicts with *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911) and *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994). This Honorable Court should reverse the First Court of Appeals and hold that the proceedings for sanctions against Petitioner were contempt proceedings and that Petitioner was entitled to have his conduct proven beyond a reasonable doubt.

QUESTION 10: Was Petitioner subjected to multiple and/or successive punishments for the same conduct in violation of his Double Jeopardy protections under the Fifth and Fourteenth Amendments when Petitioner was (i) fined $500 for criminal contempt, (ii) then acquitted in a separate criminal contempt proceeding, and (iii) then fined $100,000 for the same conduct?

Double Jeopardy

During the trial in 1992, Petitioner was held in contempt and fined $500, which Petitioner paid. After the trial in 1992, the trial court issued a Show Cause Order (Appendix F) commanding Petitioner to appear and show cause why he should not be held in contempt for some of the same conduct that the trial court used in assessing the sanctions against Petitioner. This contempt was sought by the Respondents. After a full trial on the merits of the contempt, Petitioner was acquitted. Appendix G.

The trial court used the conduct that was the subject of contempt proceedings against Petitioner to determine the amount of sanctions to impose against Petitioner. Appendix A. The payment of the fine on the one contempt and Petitioner's acquittal on the second contempt forbids the use of that conduct

to form the basis for any sanctions in any other proceeding. *United States v. Benz*, 282 U.S. 304 (1930). Further, the use of the conduct on which Petitioner had been acquitted, denies Petitioner *double jeopardy, res judicata* and *collateral estoppel* rights as set forth in *Ashe v. Swinson*, 397 U.S. 436 (1970) and *United States v. Dixon*, 509 U.S. 688 (1993). When an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *Ashe*, at p. 443. The Court of Appeals denied Petitioner's point of error which raised this constitutional violation. (Appendix B, page 36a)

CONCLUSION

If allowed to stand, the reported decision of the First Court of Appeals will harbinger the death of Due Process in Texas. For all of the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari and, upon full submission, reverse and render the decision of the First Court of Appeals and remand this cause to the Supreme Court of Texas for further proceedings not inconsistent with this Court's decision. Petitioner respectfully requests that this Honorable Court grant Petitioner general relief.

Respectfully submitted,

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